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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83 - 6230

THEODORE HARRIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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Bar of the Supreme Court
and

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On the Petition:
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QUESTIONS PRESENTED

1. Whether, consistent with the Eighth and Fourteenth Amendments, a capital defendant may refuse to have the jury instructed on lesser included offenses fairly raised by the evidence, and whether the brief colloquy between the defendant and the Court in this case was sufficient to permit this capital defendant to knowingly and intelligently waive such defenses.

2. Whether, consistent with the Fifth and Fourteenth Amendments, the petitioner voluntarily waived his right to remain silent and whether his subsequent statements were voluntarily made where he was interrogated continuously for six hours at night in a special police interrogation room; where he was forced to sit, hand-cuffed, in a straight-backed chair for the entire time, despite the fact that his arm was in a cast from recent surgery; where he was given no food or drink or allowed to leave the room; and where he maintained his innocence throughout the night until the final inculpatory statement was given.

3. Whether the petitioner's statements should have been suppressed as fruits of an unlawful arrest in violation of the Fourth Amendment where the law enforcement officials intentionally or with reckless disregard for the truth made materially false statements in the affidavit filed in support of the warrant for his arrest and where the affidavit did not contain sufficient allegations to support a finding of probable cause without the false statements.

4. Whether the prosecutor improperly commented to the jury on the failure of the petitioner to testify in his own behalf in violation of the Fifth Amendment when the prosecutor urged the jury to disbelieve petitioner's contention that his confession was involuntary because petitioner just "sat there and remained the same immobile, unemotional self as he has this entire trial" and to reject his alibi because it was "uncorroborated."

5. Whether the imposition of the death penalty violated the Eighth and Fourteenth Amendments in this case by the prosecutor's false and prejudicial arguments to the jury concerning the

likelihood that petitioner would soon be released if he was not sentenced to death.

6. Whether imposition of the death penalty violated the Eighth and Fourteenth Amendments in this case because the jury voted for the death penalty only by a majority vote and reached this close decision based on one improper aggravating circumstance; thus, under the circumstances of this case, the presence of this improper consideration was not harmless despite the fact that the jury found the presence of other aggravating circumstances.

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STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Theodore Harris, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Florida entered in these proceedings on September 8, 1983.

OPINIONS BELOW

The Judgment and Opinion of the Florida Supreme Court affirming the petitioner's conviction for first-degree murder, burglary with an assault, and robbery and sentence of death is reported as Harris v. State, 438 So.2d 787 (Fla. 1983). See Appendix A. The Order denying the petitioner's Motion for Rehearing is unreported. See Harris v. State, Case No. 61,343 (Fla. November 8, 1983)(Appendix B).

JURISDICTION

The Judgment and Opinion of the Supreme Court of Florida sought to be reviewed by this Petition was entered on September 8, 1983. On December 27, 1983, this Court granted an extension of time to file this petition to and including February 6, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1247(3), petitioner having asserted below and asserting here a deprivation of rights guaranteed by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

the Eighth Amendment to the Constitution of the United States, which provides:

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted...

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

[Nor] shall any state deprive any person of life, liberty, or property without due process of law.

This case also involves the following provisions of the statutes of the State of Florida which are set forth in Appendices C, D and E to this Petition. Fla.Stat.Ann. §§ 782.04, 921.141; Florida Rules of Criminal Procedure, Rule 3.250.

HOW THE FEDERAL QUESTIONS
WERE RAISED AND DECIDED BELOW

1. The issue of whether the petitioner could waive consideration by the jury of his culpability for lesser included offenses was discussed at the trial itself and was raised by appellate counsel on direct appeal. The Florida Supreme Court addressed the issue on its merits but affirmed the procedure followed in this case in its published opinion. See Appendix A.

2. The issue of whether the petitioner's confession was voluntary was raised by pretrial motion, decided by the trial judge after holding hearings thereon, and was raised but rejected by the Florida Supreme Court on direct appeal.

3. The issue of whether the search warrant was tainted by intentional or reckless material mis-statements was likewise raised by pretrial motion, decided by the trial judge after holding hearings thereon, and was raised but rejected by the Florida Supreme Court on direct appeal.

4. Trial counsel contemporaneously objected at trial to the prosecutor's comments concerning petitioner's decision not to testify in his own behalf, and the issue was raised but rejected by the Florida Supreme Court on direct appeal.

5. Trial counsel also contemporaneously objected during the sentencing phase of the trial to the prosecutor's remarks concerning the likelihood of petitioner's release should the jury not sentence him to die, and the issue was raised but rejected by the Florida Supreme Court on direct appeal.

6. The issue of whether the death sentence otherwise comports with the Eighth and Fourteenth Amendments was raised by appellate counsel but rejected by the Florida Supreme Court.

STATEMENT OF THE CASE

Petitioner was indicted for the offenses of first degree

murder, burglary of a dwelling, and robbery on April 29, 1981. (R. 4-5A).¹ On July 14, 1981, petitioner filed a series of motions attacking the validity and applicability of the death penalty to this case. The motions were denied by the trial court on September 10, 1981. (R. 70-A). On July 15, 1981, petitioner filed motions to suppress statements on both Fourth and Fifth Amendment grounds. These motions were denied after hearings held on September 8, 9, and 10, 1981. (R. 88-A).

Petitioner went to trial before a jury on September 22-25, 1981. (R. 125-203). Petitioner was found guilty of all counts on September 26, 1981. (R. 204-206). On September 29, 1981 the penalty phase of the trial commenced for the capital murder charge, and the jury recommended the imposition of the death penalty by majority vote that same day. (T. 83 - 9/29). The trial court then proceeded to sentence petitioner to the death penalty on the first degree murder charge. He also sentenced him to one hundred (100) years imprisonment on the armed burglary count and another one hundred (100) years imprisonment on the armed robbery count. The court further ordered that these sentences were to be served consecutively. (R. 278). In addition, the court retained jurisdiction for one-third of the total consecutive sentence imposed.

On September 8, 1983 the Supreme Court of Florida affirmed petitioner's conviction. See Appendix A.

STATEMENT OF THE FACTS

The Crime

On Saturday evening, March 22, 1981, Essie Daniels and her neighbor Ezelle Pittman attended a Church Fellowship Dinner. Pittman then escorted Daniels back to her residence in Opa-Locka, Florida, some time prior to midnight. Pittman stayed with Daniels until she closed and locked her doors, then returned to

¹ In this Petition, "R" is a reference to the Record prepared for the direct appeal to the Florida Supreme Court, and "T" is a reference to the trial transcript. Because the trial transcript is contained in several volumes, we will also refer to the transcript by the date of the hearing in question.

her own home next door. (T. 234, 248 - 9/22/81). The following morning, Pittman noticed that Daniels had not been out to feed her cat or pick up the newspaper. She also noticed curtains blowing, indicating an open window. (T. 245-247 - 9/11). Finally, after waiting until about 10:00 a.m., Pittman decided to investigate and found the screen door ajar and water running out of the front door. She then went home for the extra key to Daniels' residence. When she returned, she found Daniels in her housecoat, laying across a piece of furniture with her face turned toward the wall. (T. 248-49 - 9/22). She then called the police.

The Initial Investigation

The first officer to arrive at the scene was Opa-Locka Police Officer Donald Matrone. By the time he arrived, the front door had already been unlocked. When he entered, he noticed that the house had been ransacked, and the living room floor was saturated with water coming from the kitchen sink, the faucet running. (T. 267-70 - 9/22).

He observed the victim on the floor and checked her for vital signs, finding none. He also observed a rock laying in the area of the victim's head with what appeared to be blood on it. The victim's body was also covered with blood; furniture was covered with blood and overturned, and dresser drawers were pulled out. (T. 270-73 - 9/22). In the kitchen sink, directly beneath the running water, was a knife. (T. 273 - 9/22).

Other officers then arrived and found signs of a forced entry by the bedroom window. Daniels' empty purse was discovered on the floor. The officers also discovered what appeared to be blood on the outside window sill. (T. 35-36 - 9/23). As these officers conducted a further search of the premises, they found further evidence of blood in other parts of the house, including the refrigerator, the living room couch, on the walls and the doorsill of the door. (T. 43-46 - 9/23). Blood samples were then taken and sent to a police lab. (T. 143 - 9/23). An autopsy was conducted and concluded that the cause of death was a combination of multiple stab wounds and incised wounds associated

with blunt trauma. (T. 162, 182 - 9/23).

The lead homicide investigator on the scene was Detective John Parmenter. While supervising the investigation, Detective Parmenter was approached by Lionel Cook, the grandson of the victim by marriage. (T. 192 - 9/23; T. 177 - 9/24). Cook told Parmenter that he lived about five minutes from the victim with his stepson Gregory Williams and his wife Sarah Cook. (T. 196 - 9/23). He also told Detective Parmenter that the petitioner was once married to his wife's sister, making petitioner his former brother-in-law, and that petitioner had lived in the Cook household for the past seven or eight months. (T. 197 - 9/23). He then told the Detective that petitioner had borrowed his wife's car the preceding evening and had not returned. In the morning he received a telephone call indicating that petitioner was in Jackson Memorial Hospital with a severely lacerated hand. (T. 200, 209, 210, 241 - 9/23).

He then went to the hospital to retrieve his wife's car. He briefly visited the petitioner who told Cook that a group of black men "took his necklace." (T. 274 - 9/23).

After obtaining his car keys from the hospital property room, along with petitioner's clothes, Cook returned home in his wife's car. He found two bloody towels in the car and what appeared to be drops of blood on the front seat. (T. 216 - 9/23).

Cook told Detective Parmenter briefly about his trip to the hospital and about the bloody towels. Parmenter then drove Cook back to his home where Cook retrieved the towels and turned them over to the Detective. Later that evening, Detective Parmenter returned and requested that Cook give him the bag of petitioner's clothing. (T. 222-23 - 9/23).

The Interrogations and Arrest of the Petitioner

After leaving Cook's residence, Detective Parmenter, along with Detective Roosevelt Turner, went to Jackson Memorial Hospital to speak with the petitioner. They saw him about 8:45 p.m. on Sunday evening, March 23rd, just after surgery on petitioner's hand. (T. 182-84 - 9/24). Petitioner denied any

involvement with the homicide and told the detectives that he used the Cooks' vehicle the preceding night to go to McDonald's Lounge located nearby. (T. 190 - 9/24). He stated that upon getting out of his car, he was approached by several black males at knifepoint and robbed of his necklace. He resisted and grabbed the blade of the knife; his hand was cut when the assailant pulled the knife away. (T. 190-191 - 9/24). The offenders then fled on foot. Petitioner then went to the hospital. (T. 191-92 - 9/24).²

Meanwhile, Kathy Nelson, a forensic serologist with the Public Safety Department, had received for testing twenty-four samples of evidence, including the rock found near the victim, the knife found in the sink, a chair, the towels found in the Cooks' automobile, petitioner's clothing, as well as the blood samples taken from various parts of the victim's house. (T. 30, 43-49, 67 - 9/25). Type A blood was discovered in the kitchen, on petitioner's clothing, on the rock and on the towels; no determination could be made concerning the knife. (T. 57, 79, 84-86 - 9/25). Type O blood was found on the chair, on the furniture, rug, bathrobe and other items taken from the victim's house. (T. 53-56 - 9/25). The victim's blood was determined to be type O and the petitioner's to be type A. (T. 65-68 - 9/25). Ms. Nelson was unable to find any traces of blood consistent with the victim's on any of the petitioner's clothing, however. (T. 94 - 9/25). By further enzyme analysis of the blood samples, Ms. Nelson was able to make rough correlations between the blood samples taken from the victim and the petitioner to percentages of the general population. (T. 75 - 9/25).

While the officers were continuing their investigation, petitioner left the hospital. Detective Parmenter was subsequently notified by the Cooks that the petitioner had been told he could no longer live with them anymore and that the

² Detective Parmenter took notes of both his hospital interview with the Petitioner and his previous interview with Cook, but testified that both sets of notes were "thrown away." (T. 7 - 9/9).

petitioner was returning to his previous residence in Jacksonville, Florida, where he was on probation for a purse snatch robbery. (T. 31, 32 - 9/10). Detective Parmenter then secured an arrest warrant based on certain representations concerning the results of Ms. Nelson's serology tests, other forensic evidence, and petitioner's presence in Jacksonville. In Jacksonville, the petitioner called his probation officer, Nancy Brochin, to schedule a meeting. Brochin contacted Detective Parmenter and the petitioner was subsequently arrested shortly after arriving at Brochin's office for his scheduled appointment. (T. 204 - 9/24).

Petitioner was arrested at 12:50 p.m. (T. 212, 292 - 9/24). At the time of his arrest, his right arm was still in a cast from his recent hand surgery and his fingernails were secured by clips. (T. 13 - 9/9; T. 294, 303 - 9/24). Nevertheless, the officers handcuffed his injured right arm to his left hand behind his back, and he remained handcuffed either in this position or to the chair during the entire period of his interrogation until he confessed. (T. 88 - 9/9). He was immediately taken to a special interrogation room in the Jacksonville Police Station. The room was approximately 6 feet by 9 feet, containing only a small table and three chairs. He was read his Miranda rights and initialed the police "rights" form. The detectives then subjected him to constant interrogation, with only brief five or ten minute interruptions taken to reformulate questions, from just after 1:00 a.m. until 7:00 a.m. in the morning. (T. 12, 127 - 9/8). He was offered no food or water, nor was he allowed to leave the room.³ From the

³ During the suppression hearings, the petitioner testified that he asked for food and drink and that he asked to leave the room to relieve himself but was refused all these requests. (T. 84-94 - 9/9). Detective Parmenter testified that the petitioner made no such requests. (T. 129 - 9/8; 12-13 - 9/9). However, they do not deny the basic facts that petitioner was forced to sit in the chair, handcuffed, the entire night without any of these accommodations.

The petitioner also testified that various officers beat and slapped him about the face and head and that other officers removed the clips from his fingers and manipulated his fingers in a torturous manner. (T. 89-90 - 9/9). The officers denied these allegations. (T. 14, 44 - 9/9). However, when Detective Parmenter was shown photographs of the petitioner and asked to (footnote continued)

time he entered the police station until he initialed a statement obtained at the close of the interrogation, his arms were handcuffed behind him and he was forced to sit in one of the chairs. (T. 84-94 - 9/9).

The interrogation was led by Detective Parmenter. Detective Turner was present some of the time. In addition, Detective Turner conceded that a third officer, Detective Merrit, may have conducted some of the questioning. (T. 69 - 9/9). Throughout the evening and early morning questioning, the petitioner continued to deny any involvement in the crime. The detectives claimed that their primary tactic in questioning him was to cross-examine him about what they considered contradictory details in petitioner's version. (T. 120-26 - 9/8). For example, the officers claimed that the petitioner changed from two to three the number of black males who assaulted him. (T. 124-25).⁴

The detectives also reluctantly conceded mentioning the electric chair to the petitioner during questioning.⁵ They then told the petitioner it would be in his "best interests" to tell them what really happened rather than to continue denying involvement and that they thought he was "lying." (T. 125 - 9/8).⁶ They also told him that the physical evidence pointed to him as the culprit. (T. 16-20 - 9/8). However, they falsely

explain certain "knots" on the right side of his forehead, he could not explain them. (T. 44 - 9/9).

4 The detectives' testimony during the suppression hearings was repeatedly confronted on cross-examination by deposition testimony taken by defense counsel prior to the hearings. Thus, during Detective Turner's deposition, he testified that he did not tell the petitioner what the inconsistencies were in his versions of the night in question. (T. 74 - 9/9).

5 Prior to being confronted with his contradictory deposition testimony, Detective Parmenter denied mentioning the electric chair or anything related to the death penalty. (T. 15 - 9/8). The petitioner testified that the detectives kept telling him he was going to "burn." (T. 87 - 9/9).

6 As Detective Parmenter testified:

It was the constant pointing out of the differences in his story and pointing out that I thought he was lying because of the differences and that he was trying to fool us into believing that he didn't have anything to do with this, when, in fact, I believed he did. This went on the whole time.

told him that the serology department "had matched up" his blood with the blood found in the victim's house. (T. 126 - 9/8). Detective Parmenter initially denied showing the petitioner bloody pictures of the victim and the scene of the crime until after his first inculpatory statements, but after being confronted with his deposition testimony in which he testified that he showed the petitioner the pictures before the confession, he finally concedes that he does not recall which version was the truth.⁷ However, the petitioner testified, consistent with Detective Parmenter's deposition version, that he was shown the graphic photographs prior to making any inculpatory statements. (T. 95 - 9/9).

The trial court rejected petitioner's testimony concerning his allegations that he had asked for counsel and that he was beaten by the officers, and found that the confession ultimately obtained was not involuntary. (T 380-382). The court also rejected petitioner's argument that the arrest warrant was tainted by material misrepresentations fatal to the probable cause determination. (T. 376-378).

The Trial

The prosecution's case was presented through the testimony of the police officers who responded to the scene, medical testimony concerning the cause of death, testimony by members of the Cook family concerning the petitioner's whereabouts during the time period in question and his hospital statements, and serological evidence concerning the relative percentages of the general population with blood types similar to the victim and the petitioner. The climax of the prosecution's case was, of course, the petitioner's confession. Petitioner's final statement was read to the jury in its entirety. (T 1349-1359). In the statement, the petitioner admits having stabbed the victim repeatedly but only after she discovered him in the house in the course of an attempted burglary. Id. The statement indicates

⁷ Detective Parmenter took notes during the interview itself, but as with the notes taken during the hospital interrogation he destroyed these notes prior to the hearing. (T. 11-12 - 9/9).

that the victim suddenly appeared and came at the petitioner with a kitchen knife. Id. The knife also belonged to the victim and was not brought into the house by the petitioner. Id. The petitioner did not testify in his own behalf, but presented an alibi defense through cross-examination. He also attempted to dilute the impact of the confession by challenging its voluntariness through cross-examination of the officers.

Despite evidence suggesting that the petitioner had not premeditated the killing but simply reacted suddenly to being confronted by the knife-wielding victim, petitioner's counsel asked that no lesser included offense instructions be given.⁸ (T. 11- 9/25). After a brief colloquy with the petitioner concerning the propriety of this decision, the trial court accepted the waiver of the lesser included offense instructions as knowing and intelligent.

The jury subsequently convicted the petitioner of one count of first degree murder, one count of burglary of a dwelling occupied by a person and committing an assault therein and one count of armed robbery with a deadly weapon. (R. 204-206). The jury subsequently recommended that the petitioner be sentenced to death. (T. 1797-1798). The trial court accepted the jury's recommendation and sentenced the petitioner to death. (T. 1800-10; R 269-81).

⁸ Indeed, the Supreme Court of Florida agreed with this view of the evidence in finding that one of the aggravating factors found by the trial court -- that the murder was committed in "a cold, calculated, and premeditated manner without any pretense of moral or legal justification" -- was not supported by the record. As the Court concluded, "[i]n this instance the state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises." 438 So.2d at 798.

REASONS FOR GRANTING THE WRIT

POINT I

THE WRIT SHOULD BE GRANTED, BECAUSE A CAPITAL DEFENDANT DOES NOT HAVE THE RIGHT TO PRECLUDE THE JURY FROM CONSIDERING LESSER INCLUDED OFFENSES SUPPORTED BY THE EVIDENCE, AND EVEN IF SUCH A RIGHT EXISTS, THE PETITIONER IN THIS CASE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE CONSIDERATION OF THE LESSER INCLUDED OFFENSES.

- A. Society's Interest in Ensuring that the Death Penalty is Fairly and Rationally Imposed Requires that Juries Be Instructed on Lesser Included Offenses Where There Is Substantial Record Support for Them.

The Supreme Court of Florida has decided an important question of federal law which has not been, but should be, settled by this Court. The issue presented is whether and under what circumstances a capital defendant can refuse the protections afforded him by instructions on lesser included offenses that he is entitled to under Beck v. Alabama, 447 U.S. 625 (1980). The Supreme Court of Florida held that such instructions can be waived and that the monosyllabic responses by the petitioner to a series of questions by the trial court constituted a valid waiver. In so holding, the court first ignored the purpose of such instructions -- preserving the integrity of the fact-finding process -- and the public's interest in ensuring that the death penalty is not imposed in an arbitrary and capricious manner.

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that a death sentence may not be constitutionally imposed if the jury has not been allowed to consider an alternative verdict of guilt of a lesser included offense that is also supported by the evidence. The lesser included offense instruction is a fundamental safeguard because it ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard. As this Court found:

[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.

Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

447 U.S. at 634 (quoting Keeble v. United States, 412 U.S. 205, 212-13 (1973) (emphasis in original)).

The safeguard of the lesser included offense instruction is especially important in a capital case for "the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." Id. This Court further found that such a risk "cannot be tolerated in a case in which the defendant's life is at stake." Id. at 637.

In affirming petitioner's conviction and sentence of death, the Supreme Court of Florida acknowledged that the petitioner was entitled to have the jury instructed on all necessarily included lesser offenses. It also acknowledged that under its previous cases it had held that a trial judge is required to instruct on lesser included offenses, see Brown v. State, 206 So.2d 377 (1968), and that such instructions should be given even over strenuous objection of the defense. See State v. Washington, 268 So.2d 901 (Fla. 1972). But the Supreme Court of Florida held that the right to have lesser included instructions given to the jury is waivable by an accused and that in this case petitioner had effectively waived his right to the instructions.

The Supreme Court of Florida first erred in assuming that the right to instructions on lesser included offenses is a personal right, fully waivable by a defendant in a capital case. The requirement that a jury be allowed to consider non-capital offenses is designed to ensure that the decision to impose the death penalty is not arbitrary and capricious. Hooper v. Evans, ____ U.S. ___, 102 S.Ct. 2049, 2052 (1982). And both the defendant and the community have a strong interest in ensuring that arbitrary and capricious results are avoided. This principle stems from the fact that there is a constitutionally significant difference between the death penalty and other forms of punishment. As this Court reiterated in Beck:

[D]eath is a different kind of punishment

from any other which may be imposed in this country. . . . From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

447 U.S. at 637-38 (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1976))(emphasis added).

Because of society's strong interest in ensuring that the death sentence is imposed in a rational manner and because the absence of instructions on lesser crimes inevitably enhances the risk of wrongful conviction, there must be limitations on a capital defendant's ability to waive lesser included instructions. A high standard of waiver is particularly important when the right affects the fairness and accuracy of the factfinding process. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Especially, as here, where there is strong evidence supporting the lesser offenses, there is a correspondingly strong public interest in insisting that the accused be afforded the protection of instructions on these offenses.

The court's failure to give instructions on lesser crimes here created a substantial risk that petitioner's conviction on the capital crime was unwarranted. Petitioner's statement to the police, which provided the only account of what happened the evening Essie Daniels was killed, indicates a lack of premeditation. The killing appears to have been a spontaneous, emotional outburst after petitioner was suddenly confronted and cut by the victim. Indeed, the Supreme Court of Florida also found that "the state presented no evidence that the murder was planned and, in fact the instruments of the death were all from the victim's premises." 438 So.2d at 798.

In other contexts where a constitutional right is deemed to have a public, as well as personal, aspect, this Court has not hesitated in acknowledging limitations on the power of the individual citizen to waive those rights, even to his or her own possible detriment. For example, because of the great importance to our society of jury trials as the preferred method of fact-

finding in criminal cases, a defendant does not have an absolute right to demand a trial by a judge. Singer v. United States, 380 U.S. 24 (1965).⁹ And, due to the public interest in seeing justice is swiftly and fairly administered, defendants may not indefinitely delay their trials, thereby waiving their Sixth Amendment right to a speedy trial. Barker v. Wingo, 407 U.S. 514, 519 (1974). Nor may a defendant bar the public from his or her trial because of the importance of giving the "assurance that the proceedings were conducted fairly to all concerned." Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555, 569 (1980)(plurality opinion).

Certiorari should be granted to determine when and if ever a defendant should be permitted to refuse lesser included instructions in capital cases.

B. Petitioner Did Not Knowingly and Intelligently Waive Lesser Included Offense Instructions in this Case.

Even assuming that the petitioner was fully entitled to waive the instructions on the lesser included offenses, the Florida courts erred in finding that the petitioner had knowingly and intelligently waived the due process protections the lesser included offense instructions afford.

This Court has always set high standards for the waiver of constitutional rights. The rights are not lost unless the record demonstrates "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). We respectfully submit that this record does not indicate the kind of intelligent and voluntary waiver of known rights envisioned by Zerbst. The colloquy between the petitioner and the trial court concerning his waiver of instructions consisted of:

The Court: Mr. Harris, have your lawyers explained to you what a lesser included crime is?

⁹ "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." 380 U.S. at 36.

The Defendant: Yes.

The Court: For example, on the crime of murder, you understand the penalty is either death or life and there are certain lesser included crimes which include second degree murder which is punishable by probation to life imprisonment, third degree, probation to 15 years, and manslaughter, 15 years. Do you understand that? You attorneys have indicated that they do not request any lesser included crimes.

The Defendant: Yes.

The Court: Is that your choice?

The Defendant: Yes.

(T. 116 - 9/25).

Thus, petitioner's "waiver" was comprised of a series of leading questions by the trial judge and monosyllabic responses by the petitioner. The petitioner was never asked what was explained to him by his attorneys, nor what his understanding was of his rights that he was waiving. In fact, he was not even told that he had a right to the instruction. He was not asked if he had had an adequate opportunity to consult with his attorneys on the issue. But perhaps most importantly, the trial judge's attempt at an explanation was seriously misleading. The trial judge did not explain the most critical point concerning lesser included offenses -- that petitioner was entitled to instruction on lesser included offenses and that the jury could find him guilty of the lesser charge instead of the capital offense. Rather, the judge's description of lesser crimes conveys the impression that these were additional offenses for which the petitioner could be found guilty. It may be obvious to a person trained in the law that a person cannot stand convicted of both first degree murder and lesser included offenses. It is not so obvious to a lay person, particularly a man of limited education such as petitioner. Indeed, even the term of art "lesser included offenses" has the potential for conveying a misleading interpretation.

We respectfully submit that in a capital case, when a man's life is at stake, it is incumbent upon the court to ensure that the defendant knew what protections he was entitled to and fully understood that by waiving lesser included instructions, he was

gambling on all or nothing, or in this case life or death.

POINT II

THE WRIT SHOULD BE GRANTED BECAUSE THE FLORIDA SUPREME COURT'S RULING THAT THE PETITIONER VOLUNTARILY WAIVED HIS RIGHT TO REMAIN SILENT AND THAT THE RESULTING CONFESSION WAS VOLUNTARY FUNDAMENTALLY CONFLICTS WITH REPEATED DECISIONS BY THIS COURT.

To be voluntary a confession must be "the product of an essentially free and unconstrained choice." Culombe v. Connecticut, 367 U.S. 568, 602 (1961). The decision to confess must be "freely self-determined," Rogers v. Richmond, 365 U.S. 534, 544 (1961), "the product of a rational intellect and a free will," Blackburn v. Alabama, 361 U.S. 199, 208 (1960). The suspect's "will to resist," Rogers v. Richmond, 365 U.S. at 544, must not be overborne; nor can his "capacity for self-determination [be] critically impaired," Culombe v. Connecticut, 367 U.S. at 602.¹⁰ Most importantly, courts have a duty to discern the "manifest attitude" of law enforcement officials toward criminal suspects. Id. at 602. This Court has thus mandated "the most careful scrutiny" where the primary aim of law enforcement officials is "securing a statement from [a] defendant on which they could convict [him]" as opposed to solving the crime. Spano v. New York, 360 U.S. 315, 323-24 (1959). "Doubtless, if the prosecutors pursue a specific object in the interrogation of such an accused, and the resulting confession bears the precise fruit of their aims, it will be doubly suspect." Jurek v. Estelle, 623 F.2d 929, 938 (5th Cir. 1980)(en banc), cert. denied, 450 U.S. 1001 (1981).

To ensure that criminal defendants would have some protection from coercive police treatment, this Court established certain standards to govern law enforcement procedures. Accordingly, in Miranda v. Arizona, 384 U.S. 436, 475 (1966),

¹⁰ Admission of an involuntary confession violates due process and requires reversal of any conviction obtained thereby "even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. 368, 376 (1964). See also Mincey v. Arizona, 437 U.S. 385, 401-402 (1978).

this Court held that:

if the interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Accord Edwards v. Arizona, 451 U.S. 477, 486 n. 9 (1981). The burden is a heavy one. Courts must "indulge in every reasonable presumption against waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(emphasis added).

Miranda then required law enforcement officers to advise suspects of their various constitutional rights. However, the Court cautioned that form should not be exalted over substance; the safeguards established in Miranda are substantive, not perfunctory. Thus, the Court held:

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

384 U.S. at 444 (emphasis added); see also id. at 444 (informing accused of listed rights sufficient "unless other fully effective means are devised;" emphasis added). The mere recitation of the enumerated rights may not be enough to constitute a "fully effective" safeguard however:

The requirements of warnings and waiver of rights is a fundamental [one] with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of Interrogation.

Id. at 476 (emphasis added).¹¹

The uncontradicted¹² facts of this case demonstrate that

¹¹ An analogous problem arises in the context of determining whether police comments constitute "interrogation." In Rhode Island v. Innis, 446 U.S. 291 (1980), this Court concluded that Miranda safeguards apply to any words or actions by police officers to an accused in custody that they should know are reasonably likely to elicit an incriminating response. 446 U.S. at 301. Thus, the Court made clear that the focus of inquiry was not just one of form, but one of substance as well -- an inquiry addressing the reasonably foreseeable effect of the police conduct upon the accused citizen. 446 U.S. at 301-02.

¹² The only factual assertion mentioned in our statement of facts not actually acknowledged by police testimony during the suppression hearings concerns whether or not Detective Parmenter displayed the crime scene photographs to the petitioner prior to (footnote continued)

Miranda warnings given the appellant were indeed "simply a preliminary ritual" to a lengthy, late-night interrogation session, employing most of the "existing methods of interrogation" recorded in Miranda in what can only be interpreted as a drive to secure, not evidence needed to determine who the law enforcement officials suspected of committing the crime, but rather a confession from the intransigent suspect needed to secure his conviction.¹³

First, one technique this Court pointed out in Miranda was persistence -- interrogation "steadily and without relent, leaving the subject no prospect of surcease." 384 U.S. at 451. Repeated or prolonged interrogation has been a factor in almost all of this Court's voluntariness cases. See Mincey v. Arizona, 437 U.S. at 401; Darwin v. Connecticut, 391 U.S. 346, 347 (1968); Clewis v. Texas, 386 U.S. 707, 710 (1967); Fikes v. Alabama, 352 U.S. 191 (1957). The relentlessness of petitioner's interrogation was compounded by the bare and cell-like surroundings of the special interrogation room. Miranda, 384 U.S. at 467 ("[l]engthy interrogations or incommunicado

the confession. Since, Detective Parmenter finally could not remember and since the only other testimony on the subject is the petitioner's testimony that he was shown the photographs prior to confessing, the trial court was obliged to accept the petitioner's testimony as accurate, especially since the detective had destroyed his contemporaneous notes of the interrogation. See Haynes v. Washington, 373 U.S. 503, 510 (1963) (failure of government witnesses to rebut defendant's version when it was in their ability to do so requires acceptance of defendant's version). Accord United States v. Koch, 552 F.2d 1216, 1219 (7th Cir. 1977); Stidham v. Swenson, 506 F.2d 478, 481 (8th Cir. 1974); Townsend v. Henderson, 405 F.2d 324, 327 (6th Cir. 1968).

13 The petitioner acknowledges that in discussing whether or not a defendant has knowingly and intelligently waived his Miranda rights this Court has employed a "totality of the circumstances" test. See North Carolina v. Butler, 441 U.S. 369 (1979). In Butler this Court disagreed with the "per se rule" applied by the state court, explaining:

The per se rule that the North Carolina Supreme Court has found in Miranda does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights.

441 U.S. at 374 (emphasis added). Here, suppression was mandated on two grounds. The government failed to adequately and effectively warn the petitioner of his rights and his waiver of them was neither knowing, intelligent, nor voluntary.

"incarceration" is inconsistent with a finding of waiver). See also Jackson v. United States, 404 A.2d 911, 924 (D.C. 1979) ("late night interrogation . . . alone may make a confession involuntary"). The fact that the petitioner first gave exculpatory statements is further evidence that his will was overborne. Haynes v. Washington, 373 U.S. 503, 511 n. 8 (1963) (continued questioning of accused after completion of first confession "displays and confirms an official disregard by police . . . of the basic rights of the defendant" and "tends to bear out petitioner's version of what happened earlier"); Chambers v. Florida, 309 U.S. 227, 240 (1940) (police rejection of first confession "because it was found wanting, demonstrates the relentless tenacity which 'broke' petitioners' will and rendered them helpless to resist their accusers further"). See also Jurek v. Estelle 623 F.2d at 948 n. 15 (prior denials of involvement giving way to police questioning in stages and ultimately resulting in confession evidence that confession involuntary; citations omitted).

Second, the Court in Miranda recognized that another coercive technique is to falsely tell the accused that he has been identified as the guilty party, 384 U.S. at 453, and to posit his guilt as a matter of fact. Id. at 450. Similar tactics were employed here by the detectives' repeated statements to petitioner that he was lying and that the evidence demonstrated that he was guilty.

Third, in Miranda this Court also recognized that "[a]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Id. at 476. In addition to threats, confessions are involuntary if "obtained by any direct or implied promises, however slight." Malloy v. Hogan, 378 U.S. 1, 7 (1964) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). In this case, the detectives juxtaposed references to his charge for first degree murder and the electric chair with statements that it would be in the petitioner's "best interests" to cooperate. The inexorable message of these tactics was that

unless he confessed he would get the electric chair and if he did confess he would be spared. Statements obtained through the use of such tactics must be deemed involuntarily obtained. See United States v. Tingle, 658 F.2d 1332, 1335-36 (9th Cir. 1981)(combined use of statements about possible penalties and benefits of cooperation rendered confession involuntary under the circumstances); Brewer v. State, 386 So.2d 232 (Fla. 1980)(by raising "the spectre of the electric chair" the officers "suggested they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial").

Finally, in addition to the forgoing classic interrogation tactics, the injured petitioner was painfully handcuffed and forced to remain in an aluminum chair for some six straight hours.

We respectfully submit that the undisputed circumstances in which petitioner's confession was obtained constitute "circumstances incompatible with a voluntary waiver." Edwards v. Arizona, 451 U.S. 477, 490 (1981)(Powell, J., concurring). The trial court's findings of fact for the most part simply ignore these circumstances, relying primarily on the fact that the petitioner had a prior conviction and made one minor correction to the statement when he initialled it. The Supreme Court of Florida, conceding that "the police procedure utilized in appellant's interrogation could have destroyed the admissibility of this confession," nevertheless affirmed the trial court's ruling without conducting its own independant review of the record. Harris v. State, 438 So.2d at 794 ("we conclude on the record as a whole that there is substantial competent evidence to affirm the trial judge and the jury in their conclusion that this confession was voluntary")(emphasis added).

Certiorari should be granted to review this substantial departure from precedent established by this Court.

POINT III

THE WRIT SHOULD BE GRANTED, BECAUSE PETITIONER'S ARREST WAS IN VIOLATION OF THE FOURTH AMENDMENT DUE TO THE INTENTIONAL OR RECKLESS MATERIAL MISSTATEMENTS CONTAINED IN THE AFFIDAVIT USED TO SECURE THE ARREST WARRANT AND BECAUSE CERTIORARI IS NOW THE ONLY RECOGNIZED WAY FOR A DEFENDANT TO OBTAIN FEDERAL REVIEW OF SUCH CLAIMS.

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that under certain circumstances a criminal defendant could challenge the assertions made by law enforcement officials' affidavits submitted to judges and magistrates to secure warrants. The Court held where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally made or made with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the defendant is able to establish his allegations by a preponderance of the evidence, and with the false material in the affidavit set to one side, the remaining content is insufficient to establish probable cause, the search warrant must be voided and its fruits suppressed. 438 U.S. at 171-72.

In the proceedings below, the petitioner contended that his confession was a fruit of his unlawful arrest and that the arrest was unlawful because of material false statements contained in the arrest affidavit. Neither the trial court nor the Florida Supreme Court disputed the fact that the confession was a fruit of the arrest, but both found that the misstatements did not invalidate the warrant under the Franks standard.

The affidavit in question made the following assertions in support of probable cause: (1) that Essie Daniels was murdered on the night of March 23rd; (2) that the petitioner had a prior record for armed robbery; (3) that he was a distant relative of the victim and knew that the victim often had relatively large amounts of cash in her possession on Saturday nights; (4) that the serology tests conducted by Kathy Nelson had already established that "only a black male could have left the blood at

the scene, and that only 6 percent of the black male population could have left the identical sample on both the towel and at the scene;" (5) that the petitioner was in the hospital with a severe cut; (6) that petitioner's treating physician, Dr. Clifford, told the affiant that the wounds "were inconsistent with being defensive...but were consistent with the hand sliding down over a blade while it was used in a stabbing motion;" (7) that petitioner's alibi had not been verified but that the time frame was contradicted by one witness; and (8) that as soon as the petitioner left the hospital, he "vacated his residence and has not been located since." (R. 2).

The petitioner contended that the statements concerning the blood grouping percentages (item 4), the statements attributed to petitioner's doctor (item 6), and the statements concerning his alleged flight (item 8) were false and known to be false by Detective Parmenter at the time he made out the affidavit.

Regarding the assertions made concerning the blood, during the suppression hearing, Kathy Nelson, the serologist, denied every telling Detective Parmenter that she had narrowed the blood samples down to either black people or males. (T. 42-44 - 9/10). She told him only that the petitioner's blood and the blood found at the scene of the crime were common to six percent of the total population of the United States or roughly 13.6 million people. (T. 43 - 9/10).¹⁴ Detective Parmenter's sworn statement to the magistrate that the correlation of blood samples would be present in only six percent of the black male population, or roughly only 800 thousand people, was thus grossly misleading.

Detective Parmenter admitted that Kathy Nelsen had in fact not told him anything about percentages concerning black people's blood. He confessed that "[i]t's just an error on my part," but that while it was erroneous it was "the opinion I was under."

¹⁴ The figure of 13.6 million is derived by taking six percent of the total estimated population of the United States of 226.5 million. See United States Bureau of Census, 1980, as reprinted in the 1982 World Almanac and Book of Facts. The total black population of the United States is estimated at 26.5 million. Id.

(T. 11-15 - 9/10). The only basis he presented for this "opinion" was that he recalled discussing the subject with Ms. Nelson. Id. Detective Parmenter again produced no notes to substantiate this claim.¹⁵

Regarding the assertions concerning Doctor Clifford's alleged remarks, Detective Parmenter admitted during the suppression hearing that in fact Dr. Clifford "never mentioned the wound -- defensive wounds." (T. 18 - 9/10). In fact, Detective Parmenter stated that he tried to get Doctor Clifford to choose between two hypothetical ways the cut could have happened "for the purpose of Court and testifying and that," but the doctor specifically refused, telling the detective that "he could not come to Court and say that." (T. 17-18 - 9/10). And when he was asked whether or not he even asked the doctor whether he could swear in court that the wounds were not defensive wounds, the detective conceded "I never questioned him along that line." Id. The fact that Detective Parmenter went ahead and directly attributed statements to Doctor Clifford concerning how the wound occurred can only be interpreted as a deliberate attempt to mislead the court.

Finally, regarding Detective Parmenter's final statement in his affidavit that the petitioner had "left the hospital" and "has not been located since," testimony during the suppression hearing revealed that the Cook family, all of whom had cooperated with the government, knew his Jacksonville address and had taken him to the bus station (T. 31-32 - 9/10); that Parmenter knew the petitioner's wife was Sara Cook's sister (T. 336 - 9/24); that Parmenter even knew the Jacksonville address; and that he knew the petitioner had a parole officer there. (T. 32 - 9/10). At the very least, the detective's statements in his affidavit, implying that petitioner had fled out of fear of capture, reflect a reckless disregard for the truth.

15 The trial court also precluded defense counsel from exploring with Detective Parmenter how many prosecutors he had to go to before the warrant was approved. (T. 6 - 9/10). He did testify, however, that he told prosecutor Abe Laeser everything in the affidavit and that Laeser wrote the affidavit just as Detective Parmenter told him. (T. 6-8 - 9/10).

It should be emphasized that this was an on-going, relatively long-term investigation; Detective Parmenter was not rushed by the heat of an emergency situation. He even had time to discuss the language of his affidavit with a prosecutor. Moreover, the arrest itself was not accomplished until a week later. Surely, the detective should have discovered his errors if they were the result of mere negligence or innocent mistake.

Under these circumstances, the trial court's findings, rejecting petitioner's argument that the statements could only have been made intentionally or recklessly, have insufficient support in the record. In Franks, the defendant proffered that statements by the police officer that he had spoken personally with certain designated informants were false. This Court found this to be a sufficient finding of recklessness or intentional misstatement, at least as an offer of proof. 438 U.S. at 158. If law enforcement officials can satisfy Franks simply by asserting that they "thought" they were told things when testimony reveals unequivocally that they were not or by conceding that they erroneously attributed key statements to individuals who specifically refused to make those statements, then the right to a Franks hearing becomes a meaningless exercise.

Similarly, the trial court's alternative ruling that there was, in any event, sufficient evidence in the affidavit to support the finding of probable cause cannot withstand scrutiny. The entire Cook family obviously had been in the victim's house and knew she often had cash on Saturday nights. The fact that the petitioner had a record and was in the hospital with a cut hand are insufficient additional factors to support probable cause to arrest him for first degree murder. See United States v. Davis, 663 F.2d 824, 830-31 (9th Cir. 1981).

Certiorari should be granted on this issue, not only because of the substantial departure from Franks the Florida Supreme Court's opinion represents, but also because under Stone v. Powell, 428 U.S. 465 (1976), the petitioner will probably be precluded from raising his Fourth Amendment challenge in any

forum hereafter.

POINT IV

THE WRIT SHOULD BE GRANTED, BECAUSE THE PROSECUTOR IMPROPERLY COMMENTED ON PETITIONER'S FAILURE TO TESTIFY IN HIS OWN BEHALF.

While the petitioner elected not to testify at his trial, he presented an alibi defense through the testimony of the Cooks and the police officers themselves concerning the numerous denials of involvement that preceded his confession. Moreover, the detectives were cross-examined extensively concerning the coercive circumstances in which the confession was obtained. Thus, the petitioner's credibility was crucial to his defense. The prosecutor improperly invaded the jury's determination of this central issue by arguing to the jury:

I submit to you this was a voluntary statement taken after a considerable period of time in which he (appellant) sat there and remained the same immobile, unemotional self as he has this entire trial.

(T. 193 - 9/25; emphasis added). The prosecutor also argued to the jury that:

The State is not asking you to convict the defendant because he offered an alibi defense and that alibi defense could not be corroborated.

(T. 174 - 9/25; emphasis added).

Defense counsel made timely objections to these remarks both at trial and subsequently in post-trial motions. As counsel argued below, these statements by the prosecutor constitute clear comment on the petitioner's invocation of his Fifth Amendment right not to testify, in direct violation of this Court's admonitions in Griffin v. California, 380 U.S. 609 (1965).

The Florida Supreme Court held that the comments were not truly comments on the petitioner's right to remain silent but rather comments on his demeanor at trial concerning the voluntariness issue. Harris v. State, 438 So.2d at 794-95. We respectfully submit that the court's explanation directly undercuts Griffin and effectively overrules it.

The fact that a prosecutor aims an improper reference to a defendant's failure to testify at particular trial issues is

simply not something that ameliorates the prejudice caused by the misconduct. On the contrary, it is precisely because the prosecutor aimed his improper remarks at bolstering the most crucial piece of evidence in the case, the petitioner's confession, that the comments here were so egregious.

Nor can the comments be excused on the ground that they were merely aimed at the petitioner's demeanor. Permitting the government to randomly argue negative inferences from demeanor in most instances is tantamount to arguing personal opinion. What, after all, is the appropriate demeanor for an innocent defendant? If a defendant acts excited or nervous, can the prosecutor argue that this is evidence of the defendant's guilt? If acting calm is incriminatory, then what is not incriminatory? To ask these questions is, we submit, to answer them. Comments on a defendant's silence cannot be justified, at least under normal circumstances, by rationalizing them as mere comments on demeanor.

POINT V

THE WRIT SHOULD BE GRANTED, BECAUSE THE FLORIDA COURTS HAVE APPROVED A DEATH SENTENCE IMPOSED AS A RESULT OF IMPROPER ARGUMENTS BY THE PROSECUTOR DURING SENTENCING

In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court declared that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." 446 U.S. at 428 (emphasis added). In this case, the Supreme Court of Florida has permitted such arbitrary factors as passion and prejudice to enter into the jury's capital sentencing decision. Where, as here, the prosecutor has been permitted to play upon the emotions of the jury during the sentencing phase of the trial, the resulting sentence of death cannot be allowed to stand.

The petitioner was tried and convicted of first degree murder. In accordance with Florida's tripartite capital sentencing procedure, a sentencing hearing was then held before the jury. During the course of these proceedings, the prosecutor

urged a sentence of death, arguing to the jury:

[T]he defense may tell you, well, twenty-five years is a long time, twenty-five years without eligibility for parole. But I can tell you this -- that in twenty-five years this twenty-seven year-old defendant will be fifty-two years old. He will walk out of prison as he walked out of prison before [referring to evidence of the petitioner's prior probationary status].

The obvious implication of this argument is that if the jury were to recommend life imprisonment instead of death, in twenty-five years the petitioner would be paroled and would be free to kill again. These statements by the prosecutor were improper and prejudicial, resulting in fundamental unfairness to the petitioner at the critical sentencing phase of his trial. They were all the more improper because they were false. In addition to sentencing the petitioner to death, the trial court sentenced the petitioner to two additional and consecutive terms of 100 years imprisonment, as well as retaining jurisdiction over one-third of the total consecutive time imposed.

Under Florida's three-part capital sentencing procedure, the jury is accorded an advisory role in the sentencing of a defendant convicted of a capital crime. The jury recommendation is an integral part of the death sentencing process, and is accorded great weight by the sentencing judge. Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983); Tedder v. State, 322 So.2d 908 (Fla. 1975); cf. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983)(discussing Georgia's bifurcated procedure). Consequently, it is imperative that the sentencing phase be conducted fairly and impartially, free from the influence of passion, prejudice or any other arbitrary factor. Teffeteller v. State, 439 So.2d at 844-45; Hance v. Zant, 696 F.2d at 951; Brooks v. Francis, 716 F.2d 780, 788 (11th Cir. 1983); cf. Grant v. State, 194 So.2d 612 (Fla. 1967).

Where the prosecutor has made improper statements at this critical stage of the proceedings, the Supreme Court of Florida has determined that "the only safe rule appears to be that unless this court can determine from the record tha the conduct or the improper remarks of the prosecutor did not prejudice the accused the . . . [sentence] must be reversed." Teffeteller v. State,

439 So.2d at 845 (citation omitted). Because of the fundamental importance and delicate nature of the jury's task at this stage, curative instructions from the court can do little to remove the taint. See Pait v. State, 112 So.2d 380, 385 (Fla. 1959); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982); Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977).

Nevertheless, despite the prosecutor's plea to the passions of the jury at the sentencing hearing, the Supreme Court of Florida refused to reverse for a new sentencing hearing, free from the misconduct. There is no way of telling what effect the prosecutor's improper remarks had on the jury's recommendation of the death penalty. A sentence imposed under such circumstances is fundamentally unfair and constitutionally intolerable. Hance v. Zant, 696 F.2d at 952-53; Brooks v. Francis, 716 F.2d at 789. We therefore urge this Court to grant certiorari to limit the ability of prosecutors to undermine the due process rights of capital defendants by making improper arguments during the sentencing phases of capital cases.

POINT VI

THE WRIT SHOULD BE GRANTED, BECAUSE THERE WAS NO RATIONAL WAY FOR THE SUPREME COURT OF FLORIDA TO DETERMINE WHETHER THE TRIAL COURT'S CONSIDERATION OF AN AGGRAVATING FACTOR NOT SUPPORTED BY THE RECORD WAS HARMLESS WHEN MITIGATING EVIDENCE EXISTED IN THE RECORD.

While the Supreme Court of Florida agreed with the petitioner that there was "no evidence" that the murder was premeditated, rendering improper the trial court's consideration of premeditation as an aggravating factor, Harris v. State, 438 So.2d at 798, it nevertheless blindly "followed what seems to be its consistent practice in cases of this kind" and affirmed petitioner's death sentence. Dobbert v. Strickland, No. 82-5121 (11th Cir., Oct. 19, 1983), slip op. at 442. According to the court, the error was harmless because of the existence of other aggravating factors. In Barclay v. Florida, ____ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), this Court upheld a death sentence even though the sentencing judge considered a nonstatutory aggravating circumstance in violation of state

law. In affirming the death sentence in Barclay, however, the Court reasoned that the Supreme Court of Florida could determine the improper aggravating circumstance did not affect the trial judge's decision since there were other proper aggravating circumstances and because the sentencing court properly found no mitigating circumstances. In this case, the Supreme Court of Florida has ventured beyond any rational application of harmless error and by its decision implied "an irrebuttable presumption that the trial judge would have ruled in favor of a sentence of death even absent the impermissible aggravating circumstances." Witt v. Wainwright, No. 81-5750 (11th Cir., Sept. 16, 1983), slip op. at 4801. See also id. at 4801 ("[t]he Court's decision in Barclay was reached in light of the facts of Barclay's appeal, that there were no circumstances which mitigated the appellant's crime").

As counsel on direct appeal argued to the Supreme Court of Florida, the trial court improperly found the absence of non-statutory mitigating factors in this case. The record reflects evidence that petitioner was unarmed upon approaching the victim's home. It further indicates that appellant knew the victim was not to be home because she was sponsoring a Church dinner that evening. Mr. And Mrs. Cook had purchased five tickets from the victim to the dinner and left them for the petitioner since Mrs. Cook would not be home to prepare his dinner. (T. 205, 260, 267 - 9/23). It is reasonable to assume, then, if the inculpatory statement is accurate, that the front door of the victim's home was ajar, and there was a basis for the offender believing either that the victim was not yet home, or considering her age, that the victim was asleep. In short, the offender selected a time to enter the house when it was least likely that he would confront the victim. Even with the victim being present, the record is clear that there was no physical confrontation until after the offender was himself injured by the victim, wielding a kitchen butcher knife.

Petitioner and his ex-wife had suffered family problems in Jacksonville, Florida, and while separated, were attempting to

reconcile. (T. 197, 198 - 9/23). Moreover, as in Thompson v. State, 328 So.2d 1 (Fla. 1976), the record is clear that the offender was not armed at the time of the intrusion into the victim's home, and that the knife ultimately used in the stabbing was taken from the victim by the offender. The knife was also not used until after the offender was cut. Under these circumstances, it was certainly reasonable to assume that the intruder only intended to commit an unarmed burglary and theft.

Finally, the jury's recommendation was only by a majority vote. There is simply no way the Supreme Court of Florida could know how the jury's vote would have split had they not been asked to consider an aggravating circumstance not supported by any record evidence.

The presence of such non-statutory mitigating factors, coupled with the inclusion of the improper aggravating circumstance require that this Court grant certiorari to clarify the scope of its decision in Barclay.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



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"sections" totally devoid of factual support. *United States v. Rodriguez*, 582 F.2d 1015 (5th Cir.1978). Moreover, neither the state nor the court-appointed trial counsels were granted the opportunity to refute the sworn ineffective assistance of counsel allegation. *United States v. Prince*, 456 F.2d 1070 (5th Cir.1972); compare, *United States v. Phillips*, 854 F.2d 971 (5th Cir.1981), cert. denied, *Meister v. United States*, 457 U.S. 1126, 102 S.Ct. 2565, 73 L.Ed.2d 1354 (1982). For the above reasons, we find that Williams' claim of ineffective assistance of counsel is not, at present time, properly before this Court.

Accordingly, both the conviction and the attendant sentence are affirmed without prejudice to the right of Williams to raise the issue of ineffective assistance of counsel in a proper proceeding pursuant to Florida Rule of Criminal Procedure 3.850.

It is so ordered.

ALDERMAN, C.J., and BOYD and EHRlich, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, concurring in part and dissenting in part.

I agree with the affirmance of Williams' conviction but conclude that his sentence should be vacated and a new sentencing proceeding ordered. It appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings and thus Williams was not afforded his right of effective assistance of counsel at this critical proceeding. I would not await a collateral 3.850 motion since no further evidence is needed to establish these facts.

OVERTON, J., concurs.

Theodore HARRIS, Appellant.

v.

STATE of Florida, Appellee.

No. 61343.

Supreme Court of Florida

Sept. 8, 1983.

Rehearing Denied Nov. 8, 1983.

Defendant was convicted by jury in the Circuit Court, Dade County, Thomas E. Scott, Jr., of first-degree murder, burglary with an assault, and robbery. Defendant was sentenced to death. Defendant appealed. The Supreme Court held that: (1) defendant's arrest was lawful; (2) there was substantial competent evidence to affirm trial judge and jury's conclusion that defendant's confession was voluntary; (3) prosecutor did not comment during closing argument on defendant's failure to testify at trial; (4) trial judge properly denied defendant's requested jury instruction on inculpatory statements; (5) defendant knowingly and intelligently waived his right to have instructions on necessarily included lesser offenses given to jury; (6) prosecutor's improper comment during closing argument in sentencing hearing was not so prejudicial as to require mistrial; and (7) trial judge's improper finding of certain aggravating circumstance did not require new sentencing hearing.

Convictions and sentences affirmed.

1. Criminal Law — 213

Even assuming there was deliberate falsity concerning blood typing and evidence on that regard in police officer's sworn affidavit upon which warrant for defendant's arrest was issued, remaining contents of affidavit were legally sufficient to support finding of probable cause for issuance of warrant for defendant's arrest.



2. Criminal Law \leftrightarrow 531(3)

Even though questioning defendant for six hours in small room in police station while he was handcuffed elbow-to-wrist and was not given any food or drink could have destroyed admissibility of defendant's confession, there was substantial competent evidence that defendant's confession was voluntary.

he may expressly waive his right to jury trial. West's F.S.A. RCrP Rule 3.260.

3. Criminal Law \leftrightarrow 721(1)

For effective waiver of defendant's procedural right to have instructions on necessarily included lesser offenses given to jury, there must be express waiver of right to these instructions by defendant, rather than just request from his counsel that these instructions not be given, and record must reflect that defendant's express waiver was knowingly and intelligently made. West's F.S.A. RCrP Rule 3.260.

3. Criminal Law \leftrightarrow 721(1)

Comments on accused's failure to testify violate privilege against self-incrimination of Fifth Amendment U.S.C.A. Const. Amend. 5.

4. Criminal Law \leftrightarrow 721(3)

Prosecutor's statement during closing argument that addressed critical issue of whether defendant's confession was voluntary and, in doing so, described defendant's demeanor during his interrogation by comparing it to defendant's demeanor as he appeared at trial was not comment on defendant's failure to testify at trial. U.S.C.A. Const. Amend. 5; West's F.S.A. RCrP Rule 3.250.

10. Criminal Law \leftrightarrow 1038.1(3)

Defendant knowingly and intelligently waived his procedural right to have instructions on necessarily included lesser offenses given to jury, and thus he could not successfully argue on appeal that trial judge should have given such instructions. West's F.S.A. RCrP Rule 3.260.

5. Criminal Law \leftrightarrow 829(11)

Trial judge properly denied defendant's requested jury instruction on inculpatory statements, since standard jury instruction on accused's out-of-court statements adequately covered subject.

11. Criminal Law \leftrightarrow 723(4)

Prosecutor's comment during closing argument in sentencing hearing that, unless jury recommended death sentence, defendant would be released from prison in 25 years should not have been made because it was not fair comment either in rebuttal or upon any aggravating or mitigating factor, but such comment was not so prejudicial as to require mistrial.

6. Criminal Law \leftrightarrow 1038.1(1)

Where defendant's counsel did not object to standard jury instruction on accused's out-of-court statements as given, defendant waived right to challenge instruction on appeal. West's F.S.A. RCrP Rule 3.260(d).

12. Homicide \leftrightarrow 354

In case in which death sentence was imposed, record justified trial judge's finding of aggravating circumstance for purpose of sentencing that murder was heinous, atrocious and cruel.

7. Indictment and Information \leftrightarrow 119(8)

The necessarily included lesser offenses of first-degree murder are second-degree murder and manslaughter.

13. Homicide \leftrightarrow 354

Where, in capital case, state presented no evidence that murder was planned and instruments of death were all from victim's premises, State failed to establish beyond reasonable doubt aggravating circumstance for purpose of sentencing that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification.

8. Criminal Law \leftrightarrow 796(1)

Defendant's procedural right to have instructions on necessarily included lesser offenses given to jury does not mean that defendant may not waive this right just as

14. Homicide -> 354

Aggravating circumstance for purpose of sentencing that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification was not intended by legislature to apply to all premeditated murder cases.

15. Homicide -> 354

Trial judge's improper finding of aggravating circumstance that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification did not require new sentencing hearing, since there were still four properly applied aggravating circumstances and no mitigating circumstances, and thus imposition of death sentence was appropriate.

Harold Long, Jr., Miami, for appellant.

* Jim Smith, Atty. Gen. and Calvin L. Fox,
Asst. Atty. Gen., Miami, for appellee. —

PER CURIAM.

The appellant, Theodore Harris, was convicted of first-degree murder, burglary with an assault, and robbery. The trial judge imposed the death sentence for the murder conviction in accordance with the jury's advisory recommendation and imposed sentences of one hundred years each for the burglary and robbery convictions. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the convictions, the death sentence, and the sentences of imprisonment.

A full statement of the facts in this case, including the circumstances surrounding Harris's confession, is necessary to our discussion of the issues raised by Harris in this appeal. The victim, a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1961. She had died during the night from multiple stab wounds and wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was spattered over the

walls and furnishings of the bedroom, living room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.

While police officers were investigating at the scene of the murder, they were approached by Lionel Cook, who indicated that he suspected that Harris might be involved in the crime. At the time of the murder, Harris was living with Cook and his wife, the victim's granddaughter, in the same general neighborhood as the victim. Harris knew the victim, having attended a dinner at her house on a previous occasion, and having been previously married to Mrs. Cook's sister. Cook told the police that Harris had taken his wife's car late on Saturday night and that he had not returned it. Cook said that one of the staff of Jackson Memorial Hospital called him early Sunday morning to tell him that Harris had been hospitalized with a severely lacerated hand and that, when he went to the hospital to pick up his wife's car, he saw Harris and took Harris's personal effects from the hospital. He turned the personal effects over to the police on Sunday evening, along with two bloody towels he had found in his wife's car.

The police interviewed Harris in the hospital late Sunday night. At this interview, Harris stated that his hand had been cut the night before when two men attacked him in the parking lot of a bar and tried to steal a gold chain from around his neck. He explained that, in trying to defend himself against a knife attack, he grabbed the blade to deflect it from his body.

The police investigated further, focusing on Harris as a suspect. They examined the parking lot where Harris claimed he had been attacked, but they did not discover any trace of blood or any evidence of a scuffle. The chief investigating officer talked with the doctor who treated Harris's hand, and it was the doctor's opinion that the wounds could have been caused by the hand sliding down over the handle of a knife onto the blade while Harris was wielding the knife in a stabbing motion. Laboratory analysis showed that two types

of blood were present in the victim's house, type A and type O. The victim had type O blood; Harris' blood was type A, and it had further characteristics that made it consistent with the type A blood found at the scene. Four partial fingerprints were found in the victim's house, but none was identified as belonging to Harris. Analysis of Harris's clothing revealed the presence of type A blood, but none of the blood on these articles of clothing was ever identified as being of the victim's blood type.

The police obtained a warrant on April 7 and arrested Harris on April 14, approximately three weeks after the murder. At the time of his arrest, Harris had a cast on his right forearm that interfered with his

wrists being handcuffed behind his back, as police regulations required, so the police handcuffed his right elbow to his left wrist behind his back. Harris was interrogated at the police station from 1:00 p.m. to 7:00 p.m. During this time, he was handcuffed and sat in an aluminum chair. He did not receive either food or drink during the interrogation. The investigating officers testified that Harris was calm and matter-of-fact about everything and made no complaints about the handcuffs or his treatment.¹ He consistently denied his involvement in this murder until about 7:00 p.m., when he said, "All right, I'll tell you the truth." After giving an oral statement, Harris signed a written confession which was introduced into evidence at trial.²

why was he lying, and he says, "All right, I'll tell you the truth."

2. The text of Harris's confession is as follows:

- Q (By Detective Parmenter) For the record, would you state your full name?
A Theodore Christopher Harris
Q And your date of birth?
A September 14, 1954
Q What is your address?
A 1862 West 27th Street
Q Are you working presently?
A No, I'm not
Q How far did you go in school?
A Eleventh grade
Q Can you read and write English?
A Yes
Q Do you understand the way I'm talking to you right now?
A Yes
Q Are you under the influence of any narcotics, medication or alcohol or beverage?
A No, sir
Q Do you know of any reason why you cannot answer my questions intelligently?
A No, sir
Q Do you recognize this form I'm showing you right now?
A Yes
Q Is this the Advice of Constitutional Rights Before Interview that I read to you earlier?
A Yes
Q I'm going to go over this now, and when I ask you questions, you answer, okay?
A Yes
Q "You have the right to remain silent. You need not talk to me or answer my questions if you do not wish to do so."
Do you understand?
A Yes
Q "Should you talk to me, anything which you say can and will be introduced into evidence in court against you."

1. During direct examination by the state attorney, Detective Parmenter testified to the following:

Q Would you describe the position—the posture of the Defendant during this entire process while you and Detective Turner were taking turns talking to him and then leaving the room and then both going in, both going out? What was he doing that entire length of time?

A He always sat in the same chair.

Q During any of that time period that we're going to be covering here, did the Defendant ever complain to you of discomfort?

A No.

Q Did he ever complain about his hand?

A No

Q Did he ever ask for anything?

A No.

Q Did he ever make any special requests?

A No.

Q Would you describe his demeanor during this period of time when you and Detective Turner would ask the questions and one or both leave the room?

A It was the same as every time that I had ever talked to him. He was totally calm. Nothing seemed to bother him.

Q For how long a period did this mode of interviewing the Defendant continue prior to the time that he gave any additional statement with respect to this case?

A The entire time from when he first walked in the office until when he eventually changed the story again was six hours.

Q When did the Defendant advise you he was going to change his story?

A At 7:00 P.M.

Q Would you relate to the jury exactly what, if anything, preceded the Defendant determining that he was going to tell you another story, give you another story?

A The same type of questioning there, when was he going to tell us the truth, you know,

Note 2—Continued

Do you understand?

A Yes

Q "If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel."

Do you understand?

A Yes

Q "If you cannot afford an attorney and so desire, one will be provided without charge."

Do you understand?

A Yes

Q "Do you fully understand the above statement of your rights?"

A Yes

Q "Are you willing to answer my questions without the presence of an attorney at this time?"

A Yes

Q "This statement is signed of my own free will, without any threats or promises having been made to me."

And there is a signature there. Is that your signature?

A Yes

Q And the date is 4-14-81.

A Yes

Q And the time is 1:09 P.M.

A Yes

Q Did you write that there?

A Yes

Q And it is witnessed by myself, John Parmenter, and Detective Roosevelt Turner.

A Yes

Q Calling your attention to the evening of April [sic] 21, 1981, which was a Saturday night, where were you living at that time?

A 2501 N.W. 15th Street

Q Is that in Miami?

A Yes

Q And who were you living with?

A Lionel and Sarah Cook (phonetically)

Q On that evening [sic], at approximately 11:00 P.M., where were you?

A Walking the streets.

Q Did you have an occasion to come by the address located at 14420 N.W. 21st Court, the home of Ester Daniels?

A Excuse me. What you mean by "occasion"?

Q Did you, that evening, stop by a house located at that address?

A Yes

Q Did you know the person who lives there?

A Yes

Q Did you know that person by name?

A No

Q How did you know that person?

A She was Sarah's grandmother.

Q Had you been to that house previously?

A Yes

Q For what purpose?

A To eat there.

Q On this night, did you approach the house?

A Yes

Q Whereabouts did you approach the house at?

A The front door.

Q Did you notice anything in particular about the front door?

A It was open.

Q Were there lights on in the house?

A In the living room.

Q What did you do when you noticed the door was open?

A Went in.

Q What was your purpose in going inside?

A Getting some money.

Q When you were inside the house, did you observe the person who lived there?

A Yes.

Q And where was she?

A Coming out the kitchen.

Q Can you recall what she was wearing?

A No, but on the picture she had a gown.

Q Did she have anything in her hands?

A Yes, a knife.

Q Did she say anything to you or you to her?

A No.

Q What action did she take?

A She cut me.

Q How did she go about cutting you?

A Swinging the knife.

Q Were you aware of how many times you were cut?

A No.

Q As a result of her cutting you, what did you do?

A I took the knife from her.

Q Once you took the knife from her, what did you do with it?

A Started hitting her with it.

Q Were you stabbing her?

A Yes

Q Whereabouts on her body?

A Anywhere I could.

Q Are you aware of how many times on that night you stabbed her?

A No.

Q Did she fall down?

A Yes

Q Did you continue stabbing her?

A Yes

Q What did you do next?

A Emptied her pocketbook on the bed.

Q Where was this bed located in the house?

A In the back.

Q Once you emptied the pocketbook on the bed, what did you do?

A Took the money.

Q Do you know how much money you picked up?

A It was several bills, fives, tens, and ones.

Q And where did you put this money?

A In my pocket.

Q Were you bleeding from the hand that was cut during this time?

A Yes.

Q Are you aware of any other actions in that house that night?

The evidence presented at trial reflected three unexplained circumstances. First, police had discovered a brown paper bag in the victim's bedroom which held a plastic bag containing four hundred dollars in cash. Type A blood was found on the brown bag, but Harris said that he didn't find the bag and that, if he had, he would have taken the money. The victim's empty wallet and a knife were found in the victim's kitchen, but Harris, in his oral statement to one of the investigating officers, denied going into that room. Finally, Harris stated in his written confession that he left the victim's house through the front door although the police had found an open bedroom window from which the screen had been removed, with smears of blood on the outside of the house under the window.

Harris did not testify nor did the defense call any witnesses in the trial phase of the proceeding. The case was presented to the jury by defense counsel on the theory that the confession should not be believed because it was involuntary and that, without the confession, the state had failed to establish beyond a reasonable doubt that Harris had committed this offense. At the charge conference, defense counsel requested that no instructions be given to the jury regarding lesser included offenses for any of the crimes charged. The trial court, before agreeing not to include the required lesser-included-offense instructions, questioned Harris and obtained an unambiguous waiver.

Note 2—Continued

A No, because I came back out the front door—

Q Are you aware of whether you actually did have any actions in this house or you just can't remember?

A I can't remember.

Q Do you recall leaving by the front door?

A Yes.

Q And what did you do then?

A Went to the house.

Q When you got to the house, did you come in contact with any other person?

A No.

Q Have you discussed your involvement in this murder with any other person?

A No, I haven't.

Q Did you have an occasion to leave the City of Miami after this murder?

A When I was in the hospital.

Q Did you leave Miami sometime after this murder?

or from Harris of his right to have these instructions given. The jury returned a verdict of guilty to all counts as charged.

In the sentencing phase, the state presented medical testimony concerning the nature and extent of the injuries sustained by the victim, as well as expert opinion testimony regarding the pain experienced by the victim as a result of her wounds. Additional testimony was presented by the state to establish that Harris had previously been convicted of robbery and to confirm that Harris was on parole at the time of the murder. Harris presented no evidence in mitigation or rebuttal during the penalty phase. The jury returned a verdict recommending the imposition of the death sentence.

The trial judge imposed the death sentence, finding the following aggravating circumstances: (1) that Harris was under a sentence of imprisonment when he committed the murder; (2) that he had previously been convicted of a felony involving violence; (3) that the murder was committed while Harris was engaged in committing a robbery or burglary; (4) that the murder was especially heinous, atrocious, and cruel; and (5) that the murder was committed in a cold, calculated, and premeditated manner. The trial judge found a "complete absence" of any mitigating factors. The trial judge also sentenced Harris to one hundred years

A Yes.

Q And where did you go?

A Jacksonville.

Q What was your purpose in going to Jacksonville?

A I didn't have nowhere to stay down here.

Q Are you aware that you are under arrest for first degree murder, robbery and burglary at this time?

A Yes.

Q Has everything that you have stated been true and correct to the best of your knowledge?

A Yes.

Q Has anyone threatened or coerced you in any way to give this statement?

A No.

Q Have you given this statement freely and voluntarily?

A Yes.

DETECTIVE PARMENTER. Thank you

imprisonment for armed burglary with an assault and one hundred years for robbery with a deadly weapon, with the sentences to be served consecutively.

Trial Phase

Appellant contends that his convictions should be reversed because: (1) his confession should have been suppressed on the grounds that it resulted from an unlawful arrest and that it was involuntary; (2) the prosecutor made improper comments during closing argument concerning appellant's silence at trial; and (3) the trial judge erroneously denied a requested jury instruction on inculpatory statements and failed to properly instruct the jury on necessarily included lesser offenses to the crimes charged. For the reasons stated, we reject each of these contentions.

Admissibility of the Confession

[1] Appellant first contends that his confession should have been suppressed because it resulted from his unlawful arrest and was part of an uninterrupted chain of events following that arrest. See *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In attacking his arrest on the basis of *Franks v. Delaware*, 433 U.S. 154, 96 S.Ct. 2674, 57 L.Ed.2d 667 (1978), appellant asserts that the arrest warrant was not supported by probable cause because the sworn affidavit upon which the warrant was issued contained factual misrepresentations and inaccuracies. At an evidentiary pre-trial suppression hearing, these allegedly incorrect factual statements of the police-officer affiant were presented to the trial court, which found

that there was no deliberate falsity or reckless disregard by the investigating police agencies. Here, at best, there was a possible negligence or innocent mistake concerning a blood typing and evidence on that regard.

Moreover, assuming arguendo, there even was a falsity or disregard, there remains sufficient contents within the warrant affidavit to support a finding of probable cause.

We agree with the trial judge and find that he scrupulously adhered to the requirements of *Franks*, as well as to the dictates of this Court in *Antone v. State*, 382 So.2d 1205 (Fla.), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), in concluding that the arrest was supported by probable cause and that, even assuming there was falsity, the remaining contents of the affidavit were legally sufficient to support the arrest warrant. Since the arrest was lawful, there is no need to consider whether the causal chain between the arrest and the confession had been broken.

[2] Appellant next contends that the admitted facts in this record establish that the confession was involuntary. At the suppression hearing, appellant testified to his version of the police interrogation following his arrest. He claimed that he was questioned against his will for over six hours; that he was handcuffed elbow-to-wrist the entire time; that he was refused food and drink; that he was not allowed to go to the bathroom; and that he was subjected to emotional and physical abuse. The police officers in charge of the investigation testified that appellant was questioned for six hours in a small room in the police station and that he was handcuffed and seated in an aluminum chair. The officers denied that the appellant had been mistreated in any way and testified affirmatively that he did not complain of discomfort or of the circumstances of his interrogation. The stenographer who took the confession and reduced it to writing for appellant's signature testified that she did not see or hear any abuse of appellant or see any evidence of such abuse. Appellant signed the written confession after pointing out and initialing one correction.

The trial court made a detailed finding of fact in its order, addressing each of appellant's complaints. The court concluded that appellant was not beaten, threatened, or coerced in any manner and that the confession was freely and voluntarily made. Appellant did not testify at trial, but substantially all of the facts concerning the voluntariness of the confession presented during

the hearing on the motion to suppress were presented to the jury through the state's witnesses. Even though the police procedure utilized in appellant's interrogation could have destroyed the admissibility of this confession, we conclude on the record as a whole that there is substantial competent evidence to affirm the trial judge and the jury in their conclusion that this confession was voluntary.

Prosecutor's Comments

(3) Appellant asserts that the prosecutor improperly commented during closing argument on appellant's failure to testify at trial by stating:

I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial.

We acknowledge the established law that comments on the accused's failure to testify violate the privilege against self-incrimination of the fifth amendment. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). We have recognized in Florida that such a comment requires the reversal of a conviction and that the harmless error rule does not apply. *Davil v. State*, 389 So.2d 943 (Fla. 1979), *Trafficante v. State*, 92 So.2d 811 (Fla. 1967). See also Fla.R.Crim.P. 3.250 (formerly § 918.09, Fla. Stat. (1969)). We find, however, that these principles are inapplicable to the circumstances of this case, and we reject the argument that the quoted comments were improper.

(4) A full reading of the prosecutor's argument establishes without question that he was not referring to appellant's failure to testify at trial. The prosecutor, in fact, was addressing the critical issue of whether appellant's confession was voluntary and, in doing so, was commenting on appellant's demeanor at the time the confession was made. To understand the challenged statement, it is necessary to review the entire argument on this issue. In the transcript, the argument of the prosecutor reads as follows:

You have got to be concerned about the voluntariness of the statement; whether it was freely and voluntarily made in order to rely on the statement.

Again, you have other evidence to work with, but we are looking exclusively at the statement here.

There is nothing in the statement that indicates that it is not freely and voluntarily given. You can look at the photographs that have been introduced of the Defendant immediately after post-statement taking and you can see that the photographs indicate a man who looks exactly the same except for, perhaps, some minor change in the combing of his hair.

There are no injuries on Mr. Harris there. They didn't beat him or threaten him.

If they had beat or threatened him, the statement that he would have given would have tracked exactly what Parmenter wanted him to say, but it didn't.

How can you say the statement wasn't voluntary when the man goes through the statement and he initials every page of the statement and he makes certain corrections on the statement. He says certain things in the statement which indicate that he is expressing himself in a narrative sort of way and he is asked questions such as: What was your purpose of going into the house or what were your activities inside the house, and certainly those are broad and general enough questions for the Defendant to be able to respond to. These are his words.

I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial.

This is the type of person he is. This is the type of individual that could do something like he did in this case to Eddie Daniels.

... There is nothing in this statement which would indicate that statement was

anything but freely and voluntarily given.

(Emphasis added.) It is obvious that the prosecutor was describing to the jury the appellant's demeanor during his interrogation by comparing it to appellant's demeanor or as he appeared before them at the trial. We find that this comment does not violate appellant's fifth amendment rights nor does it violate the case law or the rules of procedure of this state.

Jury Instructions

[5, 6] Appellant argues that the trial judge improperly refused to grant his request that the following jury instruction on inculpatory statements be given:

Any confession given by a Defendant should be acted upon by both the Court and the jury with great caution, especially where the party is under arrest when the confession is made.

The trial judge denied the request for this instruction on the basis that the standard jury instruction on an accused's out-of-court statements adequately covered the matter. The standard jury instruction, as given in the trial, reads as follows:

A statement claimed to have been made outside of this Court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made; therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly, voluntarily and freely made.

In making this determination, you should consider the total circumstances including by [sic] not limited to:

One: Whether when the Defendant made the statement he had been threatened in order to get him to make it, and two, whether anyone had promised him anything in order to get him to make it.

If you conclude the Defendant's out-of-Court statement was not freely and voluntarily made, you should disregard it. Fla. StdJury Instr. (Crim.) 204(e). We fully agree with the trial judge that the stan-

dard jury instruction adequately covers the subject. Further, the record reflects that appellant's counsel did not object to the instruction as given, and, because no objection was made in accordance with Florida Rule of Criminal Procedure 3.280(d), we find that appellant waived his right to challenge the instruction on appeal.

Appellant next contends that the trial judge committed reversible error when he failed to give to the jury the mandatory instructions on the necessarily included lesser offenses of first-degree murder, burglary, and robbery. Appellant argues that our holdings in *Brown v. State*, 206 So.2d 377 (Fla.1968), *State v. Washington*, 264 So.2d 901 (Fla.1972), and *Raynor v. State*, 273 So.2d 759 (Fla.1973), mandate a trial judge to give jury instructions on all necessarily included lesser offenses. He maintains that the trial judge did not have the discretion to grant defense counsel's request that these instructions not be given or to accept appellant's waiver of the instructions.

The record in this cause reflects that appellant, through his counsel, made a specific request that no instructions on necessarily included lesser offenses be given. The trial judge took meticulous care to make sure that appellant knew of this request and had appellant personally make an express oral waiver of his right to these instructions. The colloquy between the trial judge and appellant's counsel reflects the following:

MR. WILLIAMS: For the record, pursuant to conversations with our client, we have decided and at this time we would be asking for no lessers and we ask that it be sent to the jury as charged.

THE COURT: So the record is clear, you are not asking for any lessers under the first-degree murder, any lessers under burglary nor any lesser under the armed robbery charge?

MR. WILLIAMS: No.

THE COURT: Is that correct?

MR. WILLIAMS: Yes.

THE COURT: Is it the Defendant's position, notwithstanding the fact that second, third and manslaughter are not

going to be given as lessers, that even—that there should be no explanation of lesser included under any circumstances? Do you agree with that?

MR. WILLIAMS: We agree with that, Judge.

THE COURT: Since this is unusual, I want to cover one thing for the record.

The Defendant is agreeing and stipulating that they are not requesting any lesser includeds; right?

MR. WILLIAMS: That's correct.

The colloquy between the trial judge and appellant relating to his waiver of the instructions consisted of the following:

THE COURT: Mr. Harris, have your lawyers explained to you what a lesser included crime is?

THE DEFENDANT: Yes.

THE COURT: For example, on the crime of murder, you understand the penalty is either death or life and there are certain lesser included crimes which include second-degree murder which is punishable by probation to life imprisonment; third-degree, probation to 15 years, and manslaughter, 15 years.

Do you understand that? Your attorneys have indicated they do not request any lesser included crimes.

THE DEFENDANT: Yes.

THE COURT: Is that your choice?

THE DEFENDANT: Yes, sir.

[7] In *Brown v. State*, this Court construed an existing statute and held that "a trial judge is required to instruct on necessarily included offenses because the law, particularly § 919.16, requires it."⁸ 206

8. We emphasize that the *Brown* categories of lesser included offenses were substantially established by a series of decisions approving a schedule of lesser included offenses and amending Florida Rules of Criminal Procedure 3.480 and 3.510 relating to jury instructions, effective October 1, 1961, after the trial in this cause. See *In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases*, 431 So.2d 584 (Fla. 1981), *In the Matter of the Use by the Trial Courts of the Standard Jury Instructions*

So.2d at 582. This Court has consistently held that, upon a proper request, a trial judge must give jury instructions on necessarily included lesser offenses, that a refusal of such a request constitutes fundamental error when properly preserved for appeal by timely objection under Florida Rule of Criminal Procedure 3.300(d), and that the harmless error rule does not apply. See, e.g., *Reddick v. State*, 294 So.2d 417 (Fla. 1971); *State v. Alreau*, 363 So.2d 1063 (Fla. 1978); *State v. Thomas*, 362 So.2d 1348 (Fla. 1978); *Lomax v. State*, 345 So.2d 719 (Fla. 1977).

In *State v. Washington*, the accused's counsel objected to the trial judge giving the jury the instructions on necessarily included lesser offenses but the trial court gave them anyway. The district court held that the trial judge should not have given the instructions over the accused's objections. This Court reversed, finding that "[t]he trial judge in the instant case . . . properly instructed the jury as to lesser included offenses." 268 So.2d at 902. This holding was reaffirmed in *Rayner v. State*, 273 So.2d 759 (Fla. 1973), and in *Williams v. State*, 245 So.2d 13 (Fla. 1973). In none of these cases did the defendant expressly waive his right to have such instructions given.

[8, 9] Our decisions holding that a defendant is entitled to have the jury instructed on all necessarily included lesser offenses are consistent with the holdings of the federal courts. For instance, in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2822, 65 L.Ed.2d 392 (1980), the United States Supreme Court held that a state cannot prohibit the giving of lesser-included-offense

in Criminal Cases, 431 So.2d 589 (Fla. 1981), and in *Re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla. 1981). We note that the necessarily included lesser offenses of first-degree murder are second-degree murder and manslaughter.

Section 919.16, Florida Statutes (1965), was repealed by section 110, chapter 70-339, Laws of Florida. The contents of this statute were adopted in 1967 as Florida Rule of Criminal Procedure 3.510, which was one of the rules amended effective October 1, 1961.

instructions in a death case without violating the United States Constitution. This procedural right to have instructions on necessarily included lesser offenses given to the jury does not mean, however, that a defendant may not waive his right just as he may expressly waive his right to a jury trial. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930); *Davis v. State*, 159 Fla. 838, 32 So.2d 827 (1947), *Fla.R.Crim.P.* 3.280. But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

[10] We hold that, upon the facts in this case, appellant knowingly and intelligently waived his right to instructions on necessarily included lesser offenses, and he cannot now argue that the trial judge should have given the instructions.

Penalty Phase

Regarding the penalty phase, appellant contends (1) that the prosecution made an improper comment in his closing argument, and (2) that the trial judge improperly applied two aggravating circumstances.

[11] Appellant argues that the jury's death sentence recommendation was tainted by an improper comment of the prosecution during closing argument in the sentencing hearing, when the prosecutor stated:

The Defense may tell you, Well, 25 years is a long time, 25 years without eligibility for parole, but I can tell you this: That in 25 years this 27 year old Defendant will be 52 years old. He will walk out of prison as he walked out of prison before.

Defense counsel objected, and the trial judge sustained the objection and cautioned the jury to disregard the comment. Defense counsel also made a motion for a mistrial, which was denied by the trial judge. Appellant argues that, notwithstanding

standing the cautionary instruction, the jury was improperly influenced by the prosecutor's inference that, unless the jury recommended the death sentence, appellant would be released from prison in twenty-five years. We reject this contention and find that the comment expresses not much more than what is in the statute itself and in the instructions explaining to the jury the alternatives it has in advising the court of the appropriate sentence.

The comment in this case is not at all similar to the language we condemned in *Teffeteller v. State*, -- So.2d — No. 80-237 (Fla. Aug. 25, 1983). In *Teffeteller*, the prosecutor gave a lengthy and explicit lecture to the jury on the consequences of a life sentence for the defendant in that case and also repeatedly told the jury that the defendant would kill again if he was ever released from prison. We found that this type of comment was "inexcusable prosecutorial overkill" which mandated a new sentencing hearing before a new jury. Although we agree with the trial judge in the instant case that the prosecutor's comment should not have been made because it was not a fair comment either in rebuttal or upon any of the aggravating or mitigating factors, we also agree that it was not so prejudicial as to require a mistrial. In particular, we note that the comment in the instant case contained no assertion that appellant would kill again and no lengthy lecture to the jury on the consequences of a life sentence for this defendant.

[12-15] The trial judge, finding five aggravating and no mitigating circumstances, agreed with the jury that the death sentence should be imposed. Appellant asserts that the trial judge improperly found (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We find that the record clearly justifies a finding that this murder was heinous, atrocious, and cruel. We must, however, agree that the state failed to establish beyond a reasonable doubt that this murder met the requirements of having

been committed in a cold, calculated, and premeditated manner, as we have defined this aggravating circumstance. This aggravating circumstance was not, in our view, intended by the legislature to apply to all premeditated-murder cases. See *Bolender v. State*, 422 So.2d 553 (Fla. 1982), cert. denied, — U.S. —, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *Mass v. State*, 420 So.2d 575 (Fla. 1982); *McCray v. State*, 416 So.2d 804 (Fla. 1982); *Jest v. State*, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1222 (1982). In this instance the state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises. The improper finding of this aggravating circumstance does not, however, require a new sentencing hearing since there are still four properly-applied aggravating circumstances and no mitigating circumstances. See *Ellodge v. State*, 346 So.2d 988 (Fla. 1977).

For the reasons expressed, we find the imposition of the death sentence appropriate in this cause. The convictions and sentences are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.



DEPARTMENT OF REVENUE, State of Florida, etc., et al., Petitioners,

v.

Frank A. FORD, etc., et al.
Respondents

No. 62556

Supreme Court of Florida.

Sept. 8, 1983.

Rehearing Denied Nov. 4, 1983.

Taxpayers brought action challenging imposition of ad valorem taxes on their

subsurface rights. The Circuit Court, Volusia County, James T. Nelson, J., denied relief and instead ordered Department of Revenue to ensure that ad valorem taxation statute would be applied equally throughout the State. The Department appealed and taxpayers cross-appealed. The District Court of Appeal, Cowart, J., 417 So.2d 1109, reversed and remanded with directions. On review, the Supreme Court, Adkins, J., held that: (1) failure of Department of Revenue to take any serious or effective action to require all property appraisers in the State to comply with statutory requirement to assess subsurface interests in or to real property did not require conclusion that application of statute to residents of county in which subsurface interests were separately assessed was unconstitutional in light of failure of property assessors in other counties to assess ad valorem taxes on owners of subsurface rights, and (2) taxpayers were not entitled to injunction compelling Department of Revenue to take appropriate action to ensure that all property appraisers in the state comply with statute requiring separate assessment of interests of owners of subsurface rights and in effect to compel equalization of ad valorem tax valuations where there was no showing that taxpayers suffered any financial detriment whatever by virtue of any lack of such separate assessments elsewhere.

Remanded with instructions.

1. Taxation \leftrightarrow 373

Department of Revenue is clearly charged with implementing legislature's intention that State's ad valorem taxation laws are enforced, implemented and administered uniformly throughout the State; central to this duty is Department's responsibility of supervising property appraisers and other local taxation officials and ensuring that they comply with laws which govern assessment, collection and administration of ad valorem taxes. West's F.S.A §§ 193.481, 195.027(1).

Supreme Court of Florida

TUESDAY, NOVEMBER 8, 1983

THEODORE HARRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 61-343

Circuit Court No. 81-7561
(Dade)

* * * * *

Upon consideration of the Motion for Rehearing filed in
the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby
denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme CourtBy *Danya Carroll*
Deputy ClerkTC
cc: Hon. Richard P. Brinker, Clerk
Hon. Thomas E. Scott, JudgeHarold Long, Jr., Esquire
Calvin L. Fox, Esquire

FLORIDA STATUTES ANNOTATED

Section 782.04 Murder

(1) (a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being

* * *

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

* * *

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

§31.541 Sentences of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) **Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to resume for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5).

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based, as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings required by the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-370, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1978, c. 78-353, § 1,

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.250. Accused as Witness

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

83-6230

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

RECEIVED

FEB 8 1984

OFFICE OF THE CLERK
SUPREME COURT, U.S.

THEODORE HARRIS, Petitioner,

v.

STATE OF FLORIDA, ET AL.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, THEODORE HARRIS, by his undersigned counsel, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

As the attached affidavit of petitioner shows, petitioner has been incarcerated since April 1981. He is currently imprisoned at the Florida State Prison, Starke, Florida. He has no income, no valuable property, and no cash or bank account. He is therefore unable to pay the costs of this proceeding or to give security for those costs.

Prior to trial, petitioner was adjudicated an indigent by the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, and counsel was appointed to defend him at trial. After his conviction, he was also found insolvent and appointed counsel to represent him on direct appeal. Present counsel are representing petitioner on a volunteer basis.

For these reasons, the motion to proceed in forma pauperis in this Court should be granted.

Respectfully submitted,

Joseph Beeler

JOSEPH BEELER
Joseph Beeler, P.A.
3050 Biscayne Blvd.
Suite 300
Miami, FL 33137
Telephone: (305) 576-3050

HOLLY R. SKOLNICK
Joseph Beeler, P.A.,
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G. RICHARD STRAFER
Zuckerman, Spaeder, Taylor &
Evans
Gables International Plaza
Suite 1020
2655 LeJeune Road
Coral Gables, FL 33134
Telephone: (305) 444-1911

RECEIVED

FEB 8 1984

Office of the CLERK
SUPREME COURT U.S.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THEODORE HARRIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

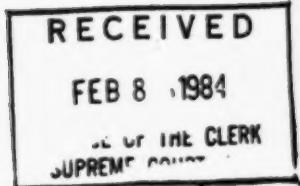
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that each party required to be served has been served and specifically that I caused one true and correct copy of the Motion for Leave to Proceed in Forma Pauperis to be placed in a container addressed to the Attorney General of the State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, with sufficient United States Post Office first-class postage prepaid and caused said container to be deposited in the United States Post Office at the Buena Vista Post Office, 66 N.E. 39th Street, Miami, Florida 33137, on this 6th day of February, 1984.

Joseph Beeler
JOSEPH BEELER

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983



83-6230

THEODORE HARRIS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

IN FORMA PAUPERIS AFFIDAVIT

I, THEODORE HARRIS, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.
2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.
3. I am unable to give security for said cause.
4. Counsel are serving on my behalf without renumeration. At trial and on appeal lawyers were appointed

to represent me because I am indigent.

5. I believe I am entitled to redress.
6. The nature of said cause is briefly stated as follows:

I was convicted in the Circuit Court, Criminal Division, in and for Dade County, Florida of first degree murder, burglary of a dwelling, and robbery and was sentenced to death. I am being detained by the State of Florida at a correctional institute in Starke, Florida. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Theodore Harris
THEODORE HARRIS

STATE OF FLORIDA

COUNTY OF:

The foregoing affidavit of Theodore Harris was subscribed and sworn to before me this 26 day of January, 1984.

Bonnie Hammig
NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Comm. Exp. Jan. 22, 1997

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED

OCTOBER TERM 1983

APR 5 - 1984

CASE NO. 83-6230

OFFICE OF THE CLERK
SUPREME COURT, U.S.

THEODORE HARRIS, :
Petitioner, :
v. :
THE STATE OF FLORIDA, :
Respondent. :
:

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, THEODORE HARRIS, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on a petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in my petition are the following:

1. Whether, consistent with the Eighth and Fourteenth Amendments, a capital defendant may refuse to have the jury instructed on lesser included offenses fairly raised by the evidence, and whether the brief colloquy between the defendant and the Court in this case was sufficient to permit this capital defendant to knowingly and intelligently waive such defenses.

2. Whether, consistent with the Fifth and Fourteenth Amendments, the petitioner voluntarily waived his right to remain silent and whether his subsequent statements were voluntarily made where he was interrogated continuously for six hours at night in a special police interrogation room; where he was forced to sit, hand-cuffed, in a straight-backed chair for the entire time, despite the fact that his arm was in a cast from recent surgery; where he was given no food or drink or allowed to leave the room; and where he maintained his innocence throughout the night until the final inculpatory statement was given.

3. Whether the petitioner's statements should have been suppressed as fruits of an unlawful arrest in violation of the Fourth Amendment where the law enforcement officials

intentionally or with reckless disregard for the truth made materially false statements in the affidavit filed in support of the warrant for his arrest and where the affidavit did not contain sufficient allegations to support a finding of probable cause without the false statements.

4. Whether the prosecutor improperly commented to the jury on the failure of the petitioner to testify in his own behalf in violation of the Fifth Amendment when the prosecutor urged the jury to disbelieve petitioner's contention that his confession was involuntary because petitioner just "sat there and remained the same immobile, unemotional self as he has this entire trial" and to reject his alibi because it was "uncontradicted."

5. Whether the imposition of the death penalty violated the Eighth and Fourteenth Amendments in this case by the prosecutor's false and prejudicial arguments to the jury concerning the likelihood that petitioner would soon be released if he was not sentenced to death.

6. Whether imposition of the death penalty violated the Eighth and Fourteenth Amendments in this case because the jury voted for the death penalty only by a majority vote and reached this close decision based on one improper aggravating circumstance; thus, under the circumstances of this case, the presence of this improper consideration was not harmless despite the fact that the jury found the presence of other aggravating circumstances.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of pursuing this petition for certiorari are true:

1. Are you presentl employed?

No

The last time I was employed was in January February At that time I earned approximately 395.00 dollars per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No

3. Do you own any case or checking or savings account?

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, orother valuable property (excluding ordinary

household furnishings and clothing)?

No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Theodore Harris

Theodore Harris

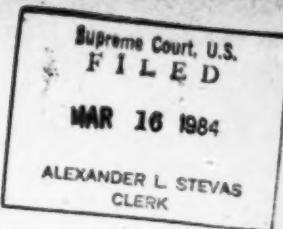
Subscribed and Sworn To
before me this day of

March, 1984.

James Banango

My Commission Expires:

MILITARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987



No. 83 - 6230

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THEODORE HARRIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION
TO JURISDICTION

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QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED
ANY SUBSTANTIAL FEDERAL QUESTION
WARRANTING THE EXERCISE OF THIS
COURT'S JURISDICTION?

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PREFACE

The Petitioner, was the Appellant in the Supreme Court of Florida and the defendant in the trial court. The Respondent, The State of Florida, was the Appellee in the Supreme Court of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

- (A) For the portions of the record attached to the present Brief of the Respondent in opposition to jurisdiction.

OPINIONS BELOW

The original opinion of the Supreme Court of Florida affirming the Defendant's convictions for first degree murder and sentences of death is reported at Harris v. State, 438 So.2d 787 (Fla. 1983). The West Publication Southern Reporter is the official Reporter for citation to this opinion.

JURISDICTION

The Defendant claims jurisdiction based upon 28 U.S.C.
§1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Defendant has correctly recited relevant constitutional and statutory provisions.

STATEMENT OF THE CASE

The State rejects the Defendant's Statement of Facts as incomplete. The opinion of the Florida Supreme Court reported at Harris v. State, 438 So.2d 787 (Fla. 1983) contains an accurate recitation of the relevant facts and is expressly adopted herein.

SUMMARY OF ARGUMENT

The Defendant's claims present no substantial federal question and the Defendant presents no special or compelling reasons for granting the writ.

ARGUMENT

The Defendant contends that the Florida Supreme Court committed six major errors of constitutional dimension its consideration of the preceding and application of the death penalty herein.

1.

LESSER INCLUDED OFFENSES.

First of all, the Defendant contends that under a Beck v. Alabama, 447 U.S. 625 (1980), the Florida Supreme Court committed constitutional error in rejecting any requirement of lesser included offenses and in excepting the Defendant's waiver of any requirement of lesser included offenses. The Defendant's argument that lesser included offenses are constitutionally required has been rejected by this Court in Hopper v. Evans, 456 U.S. 605 , 102 S.Ct. 2049 (1982). With respect to the latter contention, the opinion of the Florida Supreme Court in Harris v. State, reflects that the trial court engaged in an extensive inquiry of both defense counsel and the the Defendant as to the waiver of lesser included offenses. 438 So.2d at 795-796. Specifically, the trial court instructed the Defendant that the lesser included offenses did not have death penalty as a punishment. Id. Nevertheless, the Defendant did in fact state that he understood that fact and that he desired to waive any lesser included offenses. Id. It is of course well settled by this Court especially in its recent decisions that where the record "fairly supports" a determination of a question of fact by either a state trial court or a state appellate court, then a federal court should not intrude into such a conclusion. Cf., Wainwright v. Goode, ____ U.S.____, 104 S.Ct. 378 (1983); Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982);

Sumner v. Mata, 449 U.S. 539 (1981). There is therefore no basis to assert this Court's jurisdiction in the Defendant's complaint.

2.

CONFESSTION

The Defendant contends that the conflict in the evidence in the present case as to the Defendant's confession creates jurisdiction for this Court under Mincey v. Arizona, 437 U.S. 385 (1978) and similar decisions. The opinion of the Supreme Court of Florida contains an extensive recitation of the relevant facts with regards to the admission of the Defendant's confession, which will not be repeated here. 438 So.2d 789-792. Specifically, in rejecting the Defendant's complaint of error the Florida Supreme Court recited that there was substantial competent evidence to affirm the trial court's finding that the Defendant's confession was voluntary:

"Appellant next contends that the admitted facts in this record establish that the confession was involuntary. At the suppression hearing, appellant testified to his version of the police interrogation following his arrest. He claimed that he was questioned against his will for over six hours; that he was handcuffed elbow-to-wrist the entire time; that he was refused food and drink; that he was not allowed to go to the bathroom; and that he was subject to emotional and physical abuse. The police officers in charge of the investigation testified that appellant was questioned for six hours in a small room in the police station and that he was handcuffed and seated in an aluminum chair. The officers denied that the appellant had been mistreated in any way and testified affirmatively that he did not complain of discomfort or of the circumstances of his interrogation. The stenographer who took the confession and reduced it to writing for appellant's signature testified that she did not see or hear any abuse of appellant or see any evidence of such abuse. Appellant signed the written confession after pointing out and initialing one correction."

"The trial court made a detailed finding of fact in its order, addressing each of appellant's complaints. The court concluded that appellant was not beaten, threatened, or coerced in any manner and that the confession was freely and voluntarily made. Appellant did not testify at trial, but substantially all of the facts concerning the voluntariness of the confession presented during the hearing on the motion to suppress were presented to the jury through the state's witnesses. Even though the police procedure utilized in appellant's interrogation could have destroyed the admissibility of this confession, we conclude on the record as a whole that there is substantial competent evidence to affirm the trial judge and the jury in their conclusion that this confession was voluntary."

438 So.2d at 793-794.

In applying the totality of the circumstances attest, the Florida Supreme Court's opinion is therefore entirely consistent with the decisions that this court regarding the admission of a defendant's confession. See, e.g., North Carolina v. Butler, 441 U.S. 369 (1979).

3.

FRANKS V. DELAWARE CLAIM

The Defendant also claims that the decision of the Florida Supreme Court warrant the exercise of this court's jurisdiction because of its analysis of Franks v. Delaware, 438 U.S. 154 (1978) and the Defendant's claim there under that the affidavit upon which the Defendant's arrest warrant was issued contained "factual misrepresentations and inaccuracy." See 438 So.2d at 793. To the contrary, the Florida Supreme Court found that there was substantial competent evidence to support the trial court's conclusion that the Defendant's arrest was supported by probable cause and that even assuming any falsity in a portion of the matters in the arrest affidavit, the remaining contents of the affidavit were legally sufficient to support the arrest warrant. Id at 793. The State would contend that there is no error in

such an analysis in Franks v. Delaware, inasmuch as this court has already declined to review a decision on precisely the same grounds. See, Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. den., 449 U.S. 913 (1980). The defendant in Antone, supra, was recently executed by the State of Florida.

4.

COMMENT ON FAILURE TO TESTIFY

During the course of the trial below, the Defendant's confession was a hotly contested issue. During the course of his closing argument, the prosecutor therefore commented to the jury that :

"I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile unemotional self as he has this entire trial."

438 So.2d at 794.

The Florida Supreme Court rejected the foregoing comment as not being a violation of the Defendant's Fifth Amendment right. Id. at 795. The Florida Supreme Court's opinion is entirely consistent with every federal decision in which the issue has been considered. See, e.g., Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979); Bishop v. Wainwright, 511 F.2d 664 at 668 n.5 (5th Cir. 1975); Hayes v. United States, 368 F.2d 814, at 815 n.1 (9th Cir. 1966); Ketchem v. Ward, 422 F.Supp. 934 at 946 (W.D. N.Y. 1976), affirmed, 556 F.2d 557 (2d Cir. 1977). The opinion of the Supreme Court of Florida therefore does not contain either error or an opinion upon a matter which this court should decide.

PROSECUTOR'S COMMENT ON DEFENDANT'S
LIKELIHOOD FOR RELEASE IF JURY DID
NOT IMPOSE THE DEATH PENALTY.

During the course of the prosecutor's closing argument during the penalty phase of the proceedings below, the prosecutor also commented that:

"The defense may tell you, well, twenty-five years is a long time, twenty-five years without eligibility for parole, but I can tell you this: That twenty-seven year old defendant will be fifty-two years old. He will walk out of prison as he walked out of prison before."

438 So.2d at 797.

The Florida Supreme Court determined that the prosecutor's remark was improper but that it was not reversible error in the totality of the circumstances presented. Id. The court reasoned that the prosecutor's comment was not so severe and extensive as in previous decisions by the court. Id. Again as noted in the first issue above, the Defendant is attempting to reweigh the facts and essentially urges this court to reach a different factual conclusion than has the Florida Supreme Court. Under Goode and Mata, such a claim serves no basis for the exercise of this court's jurisdiction.

CONSTITUTIONALITY OF THE DEATH PENALTY.

Contrary to the recent decision of this court in Barclay v. Florida, U.S., 103 S.Ct. 3418 (1983) the Defendant contends that the death penalty is unconstitutional herein where one of five aggravating circumstances was found to be improper by the Florida Supreme Court and the Florida Supreme Court did not remand for resentencing. See, 438 So.2d at 797-798. There were no mitigating circumstances in the present case. Id. This argument is plainly not a basis to assert

this court's jurisdiction in the face of Barclay v. Florida.
See, also, Zant v. Stephenson, ___ U.S.___, 103 S.Ct. 2733
(1983).

VII

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 9th day of March, 1984, at Miami, Dade County, Florida.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CASE NO.

THEODORE HARRIS,)
Petitioner,)
vs.) CERTIFICATE OF SERVICE
THE STATE OF FLORIDA,)
Respondent.)
_____)

I HEREBY CERTIFY, that three true and correct copies
of the Brief of Respondent in Opposition to Jurisdiction
were caused to be served by United States Mail, First Class
delivery pre-paid upon JOSEPH BEELER, 300 Executive Plaza,
3050 Biscayne Blvd., Miami, Florida 33137 on this 9th day
of March, 1984.

Perry H. Brill Jr.
CALVIN L. FOX, Esquire
Assistant Attorney General

/sah